

Living to Fish, Fishing to Live: The Fishery Conservation and Management Act and Its Implications for Fishing-Dependent Communities

By E. MICHAEL LINSCHIED*

ON FEBRUARY 19, 1988, the *Anchorage Daily News* published a story entitled *People in Peril A Generation of Despair*.¹ The article spoke of the death and destruction of native people in the state of Alaska,² when Eskimos, Indians, and Aleuts of the Bush region of Alaska were dying at high rates “[b]y suicide, accident and other untimely, violent means.”³ The article went on to state that “death is stealing the heart of a generation and painting the survivors with despair.”⁴ The death and despair occurring within Alakanuk and other fishing-dependent communities throughout Alaska was caused, in part, by the Fishery Conservation and Management Act.⁵

As a result of the Fishery Conservation and Management Act (“FCMA”), foreign fishermen were forced off of American shores. The exclusion of foreign fishermen⁶ caused a void in the fishing industry, which was quickly filled by those from other states who brought with them technologies that increased the mechanization of fishing. As a result, the people living within traditional fishing-dependent communities had little chance to keep up with the times.⁷ The town of Alakanuk, a traditional fishing-dependent community, had “lived on

* Class of 2002. The author has spent thirteen seasons as a deckhand on a commercial fishing boat in Bristol Bay Alaska. He would like to dedicate this Comment to his father and the memory of his grandfather who gave him the experience and the inspiration to write it.

1. Howard Weaver, *People in Peril A Generation of Despair*, ANCHORAGE DAILY NEWS, Feb. 19, 1988, at A1.

2. *See id.*

3. *Id.*

4. *Id.*

5. 16 U.S.C. §§ 1801–1863 (1994).

6. The terms “fisherman” and “fishermen,” for lack of better terms, are used to identify those that fish, both male and female.

7. *See Weaver, supra* note 1, at A1.

the razor's edge: a town of 550 with eight suicides, dozens of attempts, two murders and four drownings in 16 months. This was Eskimo Armageddon."⁸ In 1988, the situation in fishing-dependent communities was at its most desperate. Communities that historically depended upon fishing could depend no more. As a result of the increased mechanization of fishing, fishing-dependent communities were being denied their primary source of income.

By 1992, the situation in the village of Alakanuk and fifty-five other Bering Sea coastal villages had changed for the better with the aid of the North Pacific Management Council.⁹ On the eve of the Sustainable Fisheries Act (which amended the FCMA), the North Pacific Management Council at its own discretion allocated 7.5% of the annual pollock, halibut, sablefish, black cod, and king crab catches to fifty-six fishing-dependent communities by way of Community Development Quotas ("CDQ").¹⁰ Alakanuk, a town that once had a poverty level above 25%, is now prospering as 30% of its adult working population are employed on trawlers and small boat fleets to take advantage of these CDQs.¹¹

The utilization of the CDQ is one example of fishing-dependent communities benefiting from the FCMA amendments. This Comment examines the impact the FCMA has had on fishing-dependent communities and how the law can operate to support its goals of conservation and management while supporting the needs of coastal fishing-dependent communities throughout the United States.

Part I discusses the interpretation of Fishery Conservation and Management Act in light of amendments brought about by the Sustainable Fisheries Act. Part II identifies the problems inherent in the FCMA as they relate to fishing-dependent communities. Part III proposes solutions for fishery conservation and management that will protect the needs of fishing-dependent communities, while allowing for conservation and management of United States fisheries.

8. 142 CONG. REC. S39 (daily ed. Sept. 18, 1996) (statement of Sen. Inouye).

9. *See id.*

10. *See id.* The purpose of the CDQ is to facilitate community involvement in the fisheries in which these communities are located by giving them an opportunity to "harvest a small portion of the total allowable catch of certain fish stocks." *Id.*

11. *See id.*

I. Background

A. Magnuson-Stevens Fishery Conservation and Management Act of 1976¹²

Congress passed the Fishery Conservation and Management Act of 1976¹³ in order to protect American fishermen as well as domestic fish stocks that had suffered throughout the previous decade.¹⁴ Congress, taking notice of the destructive conditions occurring within American fisheries, stated:

[T]he U.S. fleet is generally characterized by old vessels which are expensive to maintain, relatively inefficient, and subject to high and rapidly increasing insurance rates. Concurrent with this, in many fisheries the fishermen or crews receive relatively low earnings for the high number of hours they work. New fishermen have not been attracted to these fisheries and the average age of the fishermen seems to be rising steadily.¹⁵

Among domestic fisheries, state and federal regulations imposed limitations on entry and gear type to protect the fisheries from exploitation. At the same time, overfishing by foreign fishermen remained unchecked.¹⁶ The FCMA extended the exclusive fisheries zone from twelve miles to 200 miles off the United States coastline, and developed regional fishery management plans and regulations that would govern fishing within these exclusive fishery zones.¹⁷ The FCMA was enacted—a result of congressional urgency—to eliminate foreign fisherman from United States waters.¹⁸ The House of Representatives identified the need for urgency when it spoke of the current state of fishery resources off of the coasts of the United States:

The . . . depletion of these stocks is in large measure attributable to the phenomenal increase in recent years in the number of technologically sophisticated and very efficient foreign fishing vessels in waters off United States coasts, and that if such fishing pressure is not regulated and reduced immediately, irreversible damage may well be done to important fish stocks and to American fishing interests alike.¹⁹

12. Fishery Conservation and Management (Magnuson-Stevens) Act of 1976, 16 U.S.C. §§ 1801–1863 (1976).

13. *See id.*

14. *See* H.R. REP. NO. 94-265, at 30 (1976), *reprinted in* 1976 U.S.C.C.A.N. 593, 602.

15. *Id.*

16. *See id.*

17. *See id.* at 21, *reprinted in* 1976 U.S.C.C.A.N. 593, 593–94. The exclusive fisheries zone is the area which is off limits to foreign fishermen. *See id.*

18. *See id.* at 22, *reprinted in* 1976 U.S.C.C.A.N. 593, 594–95.

19. *Id.* at 43–44, *reprinted in* 1976 U.S.C.C.A.N. 593, 611–12.

The FCMA was a necessary first step toward the ultimate goal of ending overfishing of important and valuable fish stocks in coastal United States waters.

Eight regional councils will implement the FCMA along with the Secretary of Commerce ("Secretary") and the National Marine Fisheries Service ("NMFS").²⁰ The eight regional councils are composed of representatives from government, industry, recreational, academic, and environmental fields.²¹ "The primary responsibility of the council is to develop fishery management plans and amendments."²² The plans developed by each council must conform to the national standards set forth under the Act.²³ The Secretary "administers the Magnuson Act and reviews, approves, and implements each fishery management plan prepared by a council."²⁴ The Secretary, at appropriate times is authorized to prepare a management plan if: "(1) [A] Council fails to prepare a plan within a reasonable period of time for a fishery that requires conservation and management; or (2) the Secretary disapproves a plan or revised plan and the Council involved fails to submit a revised or further revised plan."²⁵ The Secretary of Commerce shares the responsibility of enforcing fisheries law with the Secretary of Transportation.²⁶

Section 301 of the original Magnuson-Stevens Fishery Conservation and Management Act contained seven national standards which promoted conservation and fishery management among American fishermen.²⁷

These Standards, or basic objectives for a viable conservation and management program for the Nation's fishery resources, are designed to assure that management plans and regulations take into account the variability of fish resources, the individuality of the fishermen, the needs of consumers, and the obligations to the general public, now and in generations to come.²⁸

20. S. REP. NO. 104-276, at 2 (1996), *reprinted in* 1996 U.S.C.C.A.N. 4073, 4074.

21. *See id.*

22. *Id.*

23. *See id.*

24. *Id.*

25. *Id.*

26. *See id.*

27. *See* Fishery Conservation and Management Act of 1976, Pub. L. No. 94-265, § 301, 90 Stat. 346-47 (1976).

28. S. CONF. REP. NO. 94-711, at 50 (1976), *reprinted in* 1976 U.S.C.C.A.N. 660, 674.

These national standards were to be the basis for the management plans formulated by both the Secretary of Commerce and the Fishery Management Councils.²⁹

The Fishery Conservation and Management Act successfully attained its goals of conservation and Americanization of fisheries within the United States' 200-mile zone.³⁰ The elimination of foreign fishing, which was the primary impetus for the FCMA, was "largely achieved" as a result of the Act.³¹ These foreign fishermen had been overfishing fisheries within the 200-mile zone without regard for the impact upon the American fisheries.³² The elimination of foreign fishermen from the 200-mile zone did not create completely sustainable fisheries, characterized as "stable and sustainable harvests by American fishermen."³³ Instead, this elimination changed the composition of the fishery.³⁴ Members of the United States Senate felt that if sustainable fisheries were achieved, harvests could be increased to 10.3 tons annually, which would represent thirty percent more than the harvests in 1996.³⁵ This desire for sustainable fisheries led to the amendment of the FCMA by way of the Sustainable Fisheries Act.

B. The Sustainable Fisheries Act: Amendments to the FCMA

In 1996, the Sustainable Fisheries Act³⁶ ("SFA") amended the FCMA in order to prevent fish stocks "from being overfished and to ensure that already depressed stocks are rebuilt to levels that produce maximum sustainable yields from fisheries."³⁷ The passage of the SFA occurred twenty years after the FCMA was enacted in response to the need for a long-term plan for stable and substantial harvests.³⁸ Some of the challenges facing Congress prior to the enactment of the SFA were: (1) overfishing; (2) marine habitat destruction; (3) waste and bycatch of nontarget species; and (4) limited scientific information and understanding.³⁹ This Comment focuses primarily upon the

29. See Fishery Conservation and Management Act of 1976, Pub. L. No. 94-265, § 301, 90 Stat. at 346-47.

30. See S. REP. NO. 104-276, at 3 (1996), *reprinted in* 1996 U.S.C.C.A.N. 4073, 4075.

31. See *id.*

32. See *id.*

33. *Id.*

34. See *id.*

35. See *id.*

36. Sustainable Fisheries Act of 1996, Pub. L. No. 104-297, 110 Stat. 3559 (1996).

37. President Bill Clinton, Address on the Passage of the Sustainable Fisheries Act in Washington, D.C. (Oct. 6, 1996) at www.state.gov/global/oes/961011.html.

38. See S. REP. NO. 104-276, at 3.

39. See *id.*

overfishing rationale of the SFA and how the goal of ending overfishing has impacted fishing-dependent communities.

The SFA took a more aggressive approach to ending overfishing than its predecessor, the FCMA.⁴⁰ The problem of overfishing has been analogized to the tragedy of the commons.⁴¹ The tragedy of the commons is a theory in which there is no incentive or regulation prohibiting a person from taking advantage of common property, resulting in an abuse of public land.⁴² Overfishing is a result of the tragedy of the commons; it occurs when fishermen harvest as much as possible as quickly as possible—because of a natural economic incentive—without taking into consideration the sustainability of the fishery.⁴³ The incentive of fishermen (absent regulation) to harvest as much as possible led fishermen to increase the size of their vessels and improve upon existing technology to increase their vessels' power and efficiency.⁴⁴ As a result of the trend toward increasing efficiency among American fishermen, fish stocks began to dwindle.⁴⁵ A congressional report on the viability of the SFA addressed this issue:

In several U.S. fisheries, a pattern has been repeated: fisherman lured by the promise of large and lucrative harvests, enter a fishery when fish populations are abundant. As the fishery develops, larger boats often replace smaller boats, the number of boats increases, and new technologies are continually introduced to improve each vessel's fishing power and efficiency The result is that the harvesting capacity in many fisheries has out-paced the capacity of the fisheries to renew themselves.⁴⁶

At the time the SFA was enacted, American fisheries had been depleted to all-time low levels.⁴⁷ The goal behind the SFA is to combat this destructive motive, "strengthen conservation efforts[,] and rebuild depleted fisheries."⁴⁸ In October 1998, the NMFS identified

40. See Pub. L. No. 104-297, reprinted in 1996 U.S.C.C.A.N. 4073, 4077. The terms "overfishing" and "overfished" mean a rate or level of fishing mortality that jeopardizes the capacity of a fishery to produce the maximum sustainable yield on a continuous basis. See S. REP. NO. 104-276, at 5.

41. See generally Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968).

42. See *id.*

43. See Sharon R. Siegel, *Applying the Habitat Model to Fisheries Management: A Proposal for a Modified Fisheries Planning Requirement*, 25 COLUM. J. ENVTL. L. 141, 144 (2000).

44. See *id.* at 145.

45. See *id.*

46. 141 CONG. REC. S248 (daily ed. Jan. 5, 1995) (statement of Sen. Kerry).

47. See Sustainable Fisheries Act of 1996, Pub. L. No. 104-297, 110 Stat. 3559 (1996) reprinted in 1996 U.S.C.C.A.N. 4073, 4077.

48. Pub. L. No. 104-297, reprinted in 1996 U.S.C.C.A.N. 4073, 4077.

ninety out of 290 stocks as overfished, with an additional ten stocks approaching an overfished condition.⁴⁹

The SFA set out to “require fishery management plans to specify criteria for determining when a fishery is overfished and include measures to rebuild any overfished fishery.”⁵⁰ The SFA holds the Secretary accountable to both the fishery management councils and Congress by requiring the Secretary to report annually on the status of the fisheries and to identify fisheries that are currently overfished or approaching an overfished condition.⁵¹ The SFA then puts the burden on the fishery management councils to develop a plan within a year “to stop overfishing and rebuild the fishery.”⁵² If such a plan is not developed, the Secretary may step in and act.⁵³ The purpose of the fishery management plan is to create the “optimum yield” or “the greatest overall benefit to the Nation, particularly with respect to food production and recreational opportunities, and taking into account the protection of marine ecosystems.”⁵⁴

The SFA added a number of provisions to the FCMA to aid in the goal of ending overfishing.⁵⁵ Congress added three national standards, one of which requires fishery management plans (“FMP”) to take into account fishing communities when allocating fishery resources.⁵⁶ The SFA also created more diversity among its fishery management councils, by adding two representatives to the Mid-Atlantic Council from previously underrepresented North Carolina, and by adding one Indian tribe representative to the Pacific Council.⁵⁷ In order to reduce bycatch,⁵⁸ Congress added to the requirements for FMPs by requiring that each fishery develop plans to minimize bycatch.⁵⁹ The SFA also gave discretion to the councils and the Secretary to take into account the “cultural and social framework relevant to fishing communities in developing limited access systems.”⁶⁰ The SFA further cre-

49. See National Marine Fisheries Service, Report to Congress, *Status of Fisheries of the United States*, at 3 (Sept. 30, 1997), available at www.nmfs.noaa.gov/sfa/fstatus.html.

50. Pub. L. No. 104-297, reprinted in 1996 U.S.C.C.A.N. 4073, 4077.

51. See *id.*

52. *Id.*

53. See *id.*

54. 16 U.S.C. § 1802(28) (Supp. 1999).

55. See *id.*

56. See 16 U.S.C. §§ 1851(a)(8)-(10) (Supp. 1999).

57. See S. REP. NO. 104-276, at 14 (1996), reprinted in 1996 U.S.C.C.A.N. 4073, 4075.

58. See generally S. REP. NO. 104-276, at 5 (explaining, “In the process of catching marketable seafood, nontarget fish are also taken; this incidental harvest is often termed ‘bycatch.’”).

59. See *id.* at 17-18.

60. *Id.* at 18.

ated CDQs in the Pacific Council to "contribute to the development of local economies and markets, the social and economic well-being of participants through enhanced self-sufficiency, and improvements in local infrastructures,"⁶¹ by allocating a certain percentage of the harvest to fishing-dependent communities.⁶² Facially, the SFA is an excellent attempt to eliminate overfishing by reducing bycatch while promoting the interests of fishing-dependent communities. Yet the application of the SFA has not effectuated the ultimate goal of ending overfishing.

C. The Current Fishery Conservation and Management Act

Today the Magnuson-Stevens Fishery Conservation and Management Act is a comprehensive piece of legislation that not only regulates fisheries, but also promotes the goals of environmental conservation and resource management. One of the purposes of the FCMA is to "promote commercial . . . fishing under sound conservation and management principles."⁶³ This Part discusses the FCMA's national standards and the effect these standards have on fishing-dependent communities.

1. National Standards for Fishery Conservation and Management

Section 301 of the FCMA presently contains ten national standards⁶⁴ the Secretary or regional councils should follow when developing FMPs.⁶⁵ All FMPs and regulations must be consistent with these national conservation and management standards.⁶⁶ The national standards are geared at ending overfishing and eliminating bycatch. National Standard 1⁶⁷ ("NS-1"), National Standard 5⁶⁸ ("NS-5"), and National Standard 8⁶⁹ ("NS-8") have the greatest impact on fishing-dependent communities.

61. *Id.* at 28.

62. *See id.*

63. 16 U.S.C. § 1801(b)(3) (Supp. 1999).

64. The Sustainable Fisheries Act added Standards 8 and 9 to the Magnuson-Stevens Act.

65. *See* 16 U.S.C. § 1801(a). "Any fishery management plan prepared, and any regulation promulgated to implement any such plan, pursuant to this title [16 U.S.C. §§ 1851 *et seq.*] shall be consistent with the following national standards for fishery conservation and management." 16 U.S.C. § 1851(a) (Supp. 1999).

66. *See* S. REP. NO. 104-276, at 13.

67. 16 U.S.C. § 1851(a)(1).

68. *Id.* § 1851(a)(5).

69. *Id.* § 1851(a)(8).

a. National Standard 1: Optimum Yield

National Standard 1 has evolved from only requiring that the best scientific information available be used to a standard that requires that the fishery be sustained at the "optimum yield."⁷⁰ This development is a result of the Sustainable Fisheries Act. The standard now reads that "[c]onservation and management measures shall prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery for the United States fishing industry."⁷¹ The current version of NS-1 does not require that fishing-dependent communities be protected. The amendment is consistent with the SFA in its attempts to eliminate overfishing regardless of the impact upon fishing-dependent communities.

b. National Standard 5: Efficiency Versus Economics

National Standard 5 is an example of the conflict and compromise between the large, predominantly Washington-based factory trawlers,⁷² and the smaller, Alaska-based fishermen.⁷³ NS-5 currently states: "Conservation and management measures shall, where practicable, consider efficiency in the utilization of fishery resources; except that no such measure shall have economic allocation as its sole purpose."⁷⁴ This version of NS-5 is the result of alterations to the original FCMA of 1976 with regard to "efficiency."⁷⁵ The rationale set forth by Alaska Senator Stevens for passing this amended version was that the old standard had been used to "justify ecologically wasteful, but economically efficient practices such as roe-stripping."⁷⁶ The new version of NS-5 requires that conservation and management measures "consider" efficiency rather than "promote" efficiency,⁷⁷ reveals a trend toward demonizing larger, more efficient vessels such as factory

70. H.R. REP. NO. 94-415, at 61-62 (1976).

71. 16 U.S.C. § 1851(a)(1).

72. A factory trawler is a large, highly efficient fishing vessel which consolidates the harvesting and processing on one vessel.

73. See National Marine Fisheries Service, *Sustainable Fisheries Act*, at www.nmfs.noaa.gov/sfa/sfaguide/106.htm (last modified February 1997).

74. 16 U.S.C. § 1851(a)(5).

75. See S. REP. NO. 104-276, at 13 (1996), reprinted in 1996 U.S.C.C.A.N. 4073, 4086.

76. *Id.* See National Marine Fisheries Service, *Sustainable Fisheries Act*, available at www.nmfs.noaa.gov/sfa/sfaguide/106.htm (last modified February 1997) (Roe-stripping occurs when the fish are thrown back, but the more valuable eggs or roe are saved and processed.).

77. *Id.* (noting that the goal of this amendment is not to eliminate efficiency as a consideration in the development of plans and regulations, but rather to ensure that it is balanced with the requirements of other national standards).

trawlers.⁷⁸ The current version of NS-5 is the result of small fishermen successfully displacing larger more efficient vessels by diluting the efficiency standard.⁷⁹

c. National Standard 8: Fishing-Dependent Communities

The addition of National Standard 8 to the FCMA occurred in 1996 with the passage of the SFA.⁸⁰ NS-8 is the most controversial of the national standards. Because of its potential impact upon fishing-dependent communities, its proposal led to a bitter debate between elected representatives in Washington and Alaska.⁸¹

The SFA went through a series of revisions from 1994 to 1996 as a result of the ongoing debate between members of Congress from states with large-scale fishing industries and those from states with small-scale fishing industries. The key issue in these debates was whether the councils or the Secretary were required to take into consideration the "importance of resources to fishing communities,"⁸² or whether they must consider the importance of these resources or the effects upon "fishery *dependent* communities."⁸³ The heart of this debate is that each state employs a different type of fisherman. Washington has huge fishing fleets without any significant fishing-dependent communities; Alaska has fishermen who live primarily within fishing-dependent communities. Senator Stevens suggested that NS-8 be read to protect those people who have traditionally relied upon fish as the sole source of their income.⁸⁴ Senator Gorton of Washington successfully argued that these fishing communities are "those communities 'substantially dependent upon or substantially engaged in the harvest of fish resources.'"⁸⁵ Senator Gorton's definition expanded on the definition of a fishing-dependent community given by Senator Stevens:

78. See 142 CONG. REC. S39 (daily ed. Sept. 18, 1996) (statement of Sen. Gorton).

79. See National Marine Fisheries Service, *Sustainable Fisheries Act*, available at www.nmfs.noaa.gov/sfa/sfaguide/106.htm (last modified February 1997).

80. Sustainable Fisheries Act of 1996, Pub. L. No. 104-297, 110 Stat. 3559 (1996) reprinted in 1996 U.S.C.C.A.N. 4073, 4077.

81. See generally 141 CONG. REC. S2538 (daily ed. Oct. 7, 1995); 142 CONG. REC. S39 (daily ed. Sept. 18, 1996); 142 CONG. REC. S39 (daily ed. Sept. 19, 1996).

82. 16 U.S.C. § 1851(a)(8) (Supp. 1999). See also 142 CONG. REC. S39 (daily ed. Sept. 18, 1996) (statement of Sen. Gorton).

83. 140 CONG. REC. S2538 (daily ed. Oct. 7, 1994) (statement of Sen. Stevens); see also 142 CONG. REC. S39 (daily ed. Sept. 18, 1996) (statement of Sen. Stevens) (emphasis added).

84. See 142 CONG. REC. S39 (daily ed. Sept. 18, 1996) (statement of Sen. Stevens).

85. 142 CONG. REC. S39 (daily ed. Sept. 18, 1996) (statement of Sen. Gorton).

This definition recognizes that fishers are fishers no matter where they live. An individual fisher and his or her family, whether they work on a big boat and or a small boat, are equally dependent upon the fish for their livelihoods no matter where they live. The fisher from a small New England port, an Alaska coastal town, or a metropolitan area like Seattle all make their living from the sea, their lives are all tied to the health and abundance of the fish they catch. They all deserve to be considered when difficult and painful fishery management practices need to be implemented.⁸⁶

Representative Furse from Oregon expressed disappointment with the Senate interpretation of the bill by stating “[t]he House bill contained important measures to protect small family fishermen.”⁸⁷ He also argued that the provisions in the Senate bill were less favorable than the status quo and should not be included.⁸⁸ The final version of NS-8 did not permit the Secretary or the regional councils to take into account the importance of fishery resources to fishery-dependent communities in drafting an FMP.⁸⁹ The final interpretation by Congress of NS-8 was contrary to the original intent of Senator Stevens and his cosponsors whose goal was to protect coastal fishing-dependent communities.⁹⁰ The version of NS-8 passed by Congress was “not intended to constitute a basis for allocating resources to a specific fishing community or provide preferential treatment based on residence in a fishing community.”⁹¹ The Senate further narrowed the meaning of NS-8 by saying, “[t]his standard is also not intended to be used as a basis for circumventing conservation requirements.”⁹² As a result of compromise, the impact of NS-8 has been reduced—it is no longer a tool against the large factory trawler or the large fishing corporation because it merely takes into consideration that a community is a fishing community regardless of whether the community is fishing-dependent.⁹³

The Code of Federal Regulations provides a framework for analyzing how fishing communities are to be protected under NS-8.⁹⁴ First, the FMP must examine the social and economic importance of

86. *Id.*

87. 142 CONG. REC. S39 (daily ed. Sept. 27, 1996) (statement of Rep. Furse).

88. *See id.*

89. *See* Sustainable Fisheries Act of 1996, Pub. L. No. 104-297, at 13–14, 110 Stat. 3559 (1996).

90. *See* 140 CONG. REC. S2538 (daily ed. Oct. 7, 1994) (statement of Sen. Stevens).

91. S. REP. NO. 104-276, at 14 (1976), *reprinted in* 1976 U.S.C.C.A.N. 4073, 4086.

92. *Id.*

93. *See* National Marine Fisheries Service, *Sustainable Fisheries Act*, at <http://www.nmfs.noaa.gov/sfa/sfaguide/106.htm> (last modified February 1997).

94. *See* 50 C.F.R. § 600.345 (2000).

the fishery to the communities affected by the FMP using both qualitative and quantitative information.⁹⁵ Second, the FMP is to analyze the sustained participation of these communities within a particular fishery by analyzing the history, extent, and type of participation within a specific fishery.⁹⁶ The third step in the FMP analysis is to "assess the likely positive and negative social and economic impacts of the alternative management measures, over both the short and long term, on fishing communities."⁹⁷ This third step takes into consideration the consumptive and non-consumptive uses of the fishery resources.⁹⁸ NS-8 is the most important of the national standards for protecting fishing communities that face restrictions as a result of necessary conservation measures. Yet the plain language of NS-8 does not give preference to fishery-dependent communities.⁹⁹ The CFR suggests that fishery-dependent communities should be given preference over those communities not dependent upon the fishery.¹⁰⁰ The inconsistency between the plain language of the Act and the framework set forth in the Code of Federal Regulations leaves many questions about how the FCMA is to be interpreted.

2. Community Development Quotas: A New Hope for Fishing-Dependent Communities

The Congressional intent behind CDQ programs "[is to] contribute to the development of local economies and markets, the social and economic well-being of participants through enhanced self-sufficiency, and improvements in local infrastructures."¹⁰¹ Between 1976 and 1991, Alaskan natives were excluded from many fisheries in which they had traditionally and historically played a major role because "they lacked the significant capital investment needed to participate in fisheries."¹⁰² Since 1991, the North Pacific Council has utilized CDQs in order to allocate a percentage of the annual catch to Eskimo, Aleut, and Indian fishermen who reside in Alaskan villages.¹⁰³ These CDQs were afforded to those groups who had not previously been

95. *See id.* § 600.345(c).

96. *See id.*

97. *Id.*

98. *See id.*

99. *See* 16 U.S.C. § 1851(a)(8) (Supp. 1999).

100. *See* 50 C.F.R. § 600.345.

101. S. REP. NO. 104-276, at 28 (1996), *reprinted in* 1996 U.S.C.C.A.N. 4073, 4101.

102. *Id.* at 27, *reprinted in* 1996 U.S.C.C.A.N. 4073, 4100.

103. *See id.*

afforded "fair and equitable" commercial fishing opportunities.¹⁰⁴ The CDQ program has been implemented by the North Pacific Council in the halibut and sablefish, pollock, bering sea crab, and groundfish fisheries.¹⁰⁵

A moratorium was placed on all CDQ programs as a result of the Sustainable Fisheries Act of 1996,¹⁰⁶ limiting them to their current numbers until after September 30, 2000.¹⁰⁷ The moratorium was put in place in order to "limit the new combined western Alaska CDQ program to the pollock, halibut, sablefish, crab and groundfish fisheries"¹⁰⁸ As of 1996, the Western Pacific Council had not utilized CDQs despite the fact that western Pacific fishermen, like the northern Pacific fishermen, had historically participated in western Pacific fisheries, but have had increasing difficulty maintaining their participation since the passage of the original FCMA in 1976.¹⁰⁹ Section 305(i) of the FCMA further authorized the Western Pacific Council to submit a western Pacific community development program that "allocates a percentage of the total catch of any fishery, limited entry permits, or other quotas related to vessel size and fishing zones, to western Pacific communities¹¹⁰ that participate in the program."¹¹¹

Once again, this provision of the SFA caused a bitter debate between the competing interests from Washington and Alaska. Senator Gorton declared that Senator Stevens was bent on ridding Washington fishermen from Alaskan fisheries.¹¹² Senator Gorton, out of a compromise, approved the CDQ programs so long as studies were done to ensure that these plans served their intended purpose of facilitating participating communities' entry into commercial fisheries.¹¹³ The CDQ program has since developed in a manner that gives fishing-dependent communities a chance to be self sufficient.

104. *See id.*

105. *See id.* at 27-28, *reprinted in* 1996 U.S.C.C.A.N. 4073, 4100-01.

106. Pub. L. No. 104-297, 110 Stat. 3559 (1996) (codified as amended at 16 U.S.C. §§ 1801-1883 (1999)).

107. S. REP. NO. 104-276, at 28-29.

108. *Id.* at 28.

109. *See id.* at 28.

110. *Id.* at 29 (Western Pacific communities are communities: in the area or on an island within the area of the jurisdiction of the Western Pacific Council, a majority of whose inhabitants are descended from the aboriginal peoples indigenous to the area, and in which traditional fishing practices are or have been historically used for subsistence or commercial purposes.).

111. *Id.*

112. *See* 142 CONG. REC. S39 (daily ed. September 18, 1996) (statement of Sen. Gorton).

113. *See* S. REP. NO. 104-276, at 27 (1996), *reprinted in* 1996 U.S.C.C.A.N. 4073, 4100.

Currently, CDQs for the North Pacific Regional Council involve sixty-five Bering Sea fishing communities.¹¹⁴ The north Pacific CDQ program allows for virtually any Alaskan native community to receive CDQ allocations.¹¹⁵ The original fifty-six communities involved in the CDQ program in 1992 have brought in twenty million dollars in annual revenues.¹¹⁶ The CDQ program has grown since its inception in 1992 and has the potential to become an important part of fishery management and community development since the moratorium on CDQs was lifted on October 1, 2000.¹¹⁷

3. Required and Discretionary Provisions of Fishing Community Management Plans

The FCMA contains discretionary as well as required measures that are to be taken into consideration when developing fishery management plans.¹¹⁸ The FCMA mandates that the FMP contain measures to end overfishing through conservation.¹¹⁹ The discretionary provisions permit the FMPs to consider the protection of fishing-dependent communities. When a fishery management plan is developed, the council may, as part of the discretionary provisions, "establish a limited access system for the fishery in order to achieve optimum yield" by taking into account a number discretionary factors.¹²⁰ These factors include:

(A) present participation in the fishery, (B) historical fishing practices, and dependence on the fishery, (C) the economics of the fishery, (D) the capability of fishing vessels used in the fishery to engage in other fisheries, (E) the cultural and social framework

114. See NOAA, *The Role of the North Pacific Groundfish Observer Program in the Community Development Quota Program*, Apr-May-June 2000, available at http://www.afsc.noaa.gov/Quarterly/amj2000/feature_amj00.htm (last modified June 2000).

115. See *id.* (stating:

In order to be eligible for the CDQ program . . . [e]ach community must: (1) be located within 50 nautical miles of the Bering Sea, (2) be an Alaskan Native community, (3) have residents who conduct more than half of their commercial or subsistence fishing in the Bering Sea, (4) have no previous processing or harvesting capability beyond small boat commercial fishing.).

116. See *id.*

117. See S. REP. NO. 104-276, at 28-29. The moratorium was lifted on October 1, 2000.

118. See generally 16 U.S.C. § 1853 (Supp. 1999).

119. See *id.* § 1853(a) (stating,

[a]ny fishery management plan . . . shall—(1) contain the conservation and management measures . . . which are—(A) necessary and appropriate for the conservation and management of the fishery, to prevent overfishing and rebuild overfished stocks, and to protect, restore, and promote the long-term health and stability of the fishery.).

120. *Id.* § 1853(b)(6).

relevant to the fishery and any affected fishing communities, and
(F) any other relevant considerations.¹²¹

Although these provisions intended to take into account the interests of fishing-dependent communities, they are rarely given much consideration due to their discretionary nature. As the legislative history indicates, Congress has made conservation the primary goal of the act, with economic interests being a secondary concern.

D. Administrative Statutes

1. Regulatory Flexibility Act¹²²

The encouragement of federal agencies to be innovative when dealing with “individuals, small businesses, small organizations and small governmental bodies that would otherwise be unnecessarily adversely affected by Federal regulations” is the goal behind the Regulatory Flexibility Act¹²³ (“RFA”). Pursuant to the RFA, regulatory agencies (such as the regional fishery councils) are required to publish a Regulatory Flexibility Analysis (“Analysis”) for public comment.¹²⁴ The Analysis must explain an agency’s decisions and address the number of and degree to which small entities will be affected by the proposed rule.¹²⁵ The Analysis must also list the alternatives to the proposed rule that will minimize the economic impact upon small entities.¹²⁶ The final requirement of the Act is that the FMP identify those alternatives that would minimize adverse impacts on fishing communities within the constraints of conservation and management goals of the FMP and the national standards.¹²⁷ The Analysis is utilized by the Secretary and the regional councils in developing fishery management plans.¹²⁸

121. *Id.*

122. 5 U.S.C. §§ 601–612 (1994).

123. Pub. L. No. 96-354, 94 Stat. 1164 (1980).

124. *See* 5 U.S.C. § 603(a) (stating:

Such analysis shall describe the impact of the proposed rule on small entities. The initial regulatory flexibility analysis or a summary shall be published in the Federal Register at the time of the publication of general notices of proposed rule-making for the rule. The agency shall transmit a copy of the initial regulatory flexibility analysis to the Chief Counsel for Advocacy of the Small Business Administration.).

125. *See id.* § 603(b).

126. *See id.* § 603(c).

127. *See id.*

128. *See* A.M.L. Int’l, Inc. v. Daley, 107 F. Supp. 2d 90 (D. Mass. 2000).

2. Administrative Procedures Act¹²⁹

The Administrative Procedures Act ("APA") is another way that an agency's actions may be regulated.¹³⁰ In reviewing the actions of an agency, a court may compel or set aside the actions of an agency.¹³¹ The APA permits the courts to act as a check upon agency actions by interpreting statutory and constitutional provisions to determine whether the agency correctly applied the law.¹³² The most pertinent power granted to courts under the APA is the power to set aside agency actions, findings, or conclusions.¹³³ A court may set aside an agency action under the APA if the action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."¹³⁴ The APA has been used in cases dealing with the interpretation of fishery management plans.¹³⁵

When a court reviews an agency's interpretation of a statute, it may not simply reject what the agency has proposed and impose its own construction of the statute; it must look to the statute itself. The United States Supreme Court in *Chevron v. National Resources Defense Council*¹³⁶ developed the test for reviewing an agency interpretation of a statute.¹³⁷ The Court addressed the proper interpretation of the Clean Air Act Amendments of 1977.¹³⁸ The Court held that the EPA's interpretation of a "stationary source" was a permissible construction of the term.¹³⁹

First, the *Chevron* test requires a court to determine if Congress, in drafting the statute, addressed within the statute the precise question at issue.¹⁴⁰ If Congress is silent on a specific issue, the court must follow the interpretation of the agency, unless that decision was "arbitrary, capricious, or manifestly contrary to the statute."¹⁴¹ Under the

129. 5 U.S.C. § 706 (1994).

130. *See id.*

131. *See id.*

132. *See id.* ("To the extent necessary and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.").

133. *See id.* § 706(2).

134. *Id.* § 706(2)(a).

135. *See* N.C. Fisheries Ass'n v. Daley, 27 F. Supp. 2d 650 (E.D. Va. 1998).

136. 467 U.S. 837 (1984).

137. *Id.*

138. *See id.* at 839-40.

139. *See id.* at 866.

140. *See id.* at 842.

141. *Id.* at 844. *See also* 5 U.S.C. § 706 (1994).

second prong of the *Chevron* test, the Court held that deference should be given to the department's construction of a statute.¹⁴²

II. Problem

The Magnuson-Stevens Fishery Conservation and Management Act and its amendments have significantly prevented overfishing through conservation and management measures, but the FCMA itself is inconsistent and unclear. The inconsistencies must be resolved before the FCMA can be effectively used to protect fisheries through conservation and management.

A. Conflicting Goals: Ending Overfishing Versus the Economic Interests of Fishermen

One of the primary stated purposes of the SFA is to end overfishing while attaining the optimum yield from the fishery.¹⁴³ Unfortunately, ending overfishing is a difficult task given the competing interests of environmentalists and fishermen. On one hand, environmentalists want to protect fish stocks for future generations. On the other hand, many fishermen want the greatest return on their investment. A balance must be struck between these competing interests in order to protect fisheries and those dependent upon them. The Pacific Marine Conservation Council and the Alaska Marine Conservation Council are two organizations comprised of both fishermen and environmentalists with the common interest of promoting sustainable fisheries. These organizations lobbied for the Stevens version of the SFA in order to protect fisheries as well as fishing-dependent communities.

The difficulty with attaining sustainable fisheries is that the fishermen who rely on these fisheries as a source of income must make some economic sacrifice.¹⁴⁴ In *National Resources Defense Council, Inc. v. Daley*, the District Court for the District of Columbia interpreted the SFA as requiring a balance between the mandate to end overfishing present within the SFA and the "competing" economic impacts of that mandate.¹⁴⁵ The Court of Appeals for the District of Columbia determined that these competing interests could not be balanced and that the interests expressed in NS-1 (conservation) were not to be miti-

142. See 467 U.S. at 844 (1984).

143. Pub. L. No. 104-297, at 1 (1996), reprinted in 1996 U.S.C.A.N. 4073, 4073.

144. See generally 16 U.S.C. § 1801 (Supp. 1999).

145. See *Nat'l Res. Def. Council v. Daley*, 62 F. Supp. 2d 102, 106-07 (D.D.C. 1999), overturned by *Nat'l Res. Def. Council v. Daley*, 209 F.3d 747 (D.C. Cir. 2000).

gated by economic interests of fishing communities.¹⁴⁶ The court held that a council may only take economic impact into consideration when "two different plans achieve similar conservation measures."¹⁴⁷ The court found authority for its decision within the plain meaning of the statute and in the regulations that were passed as a result of the statute.¹⁴⁸

If the SFA mandated a strict balancing between conservation and economics, councils would always be able to find a way to permit a quota in order to protect a competing economic interest. A strict balance of interests cannot be achieved because it is not logically sound. The problem with weighing economic impacts against conservation is that there will be no opportunity to create a sustainable fishery. As a result, it may be necessary for fishermen to make short-term sacrifices to protect their fishery in the long term.

B. The Provisions of the FCMA

1. Plain Language Invoking Environmental Protection: *National Resources Defense Council, Inc. v. Daley*¹⁴⁹

National Resources Defense Council demonstrates the difficulty courts have in interpreting the FCMA. In this case, the plaintiff organization filed its appeal in the United States Court of Appeals for the District of Columbia, claiming that the defendant's 1999 flounder fishing quotas did not provide sufficient assurance that defendant would meet the conservation goals of the FCMA.¹⁵⁰ This case demonstrates how courts have improperly read the statute as requiring a balancing between NS-1¹⁵¹ and NS-8.¹⁵² In reading the "plain language" of the FCMA, the court stated in dicta that "it is only when two different plans achieve similar conservation measures that the service takes into consideration adverse economic consequences."¹⁵³ The court, in ruling for National Resource Defense Council, determined that the quota was sufficient to meet the conservation goals of the FMP, and

146. See *Nat'l Res. Def. Council v. Daley*, 209 F.3d 747, 753 (D.C. Cir. 2000).

147. *Id.*

148. See *id.*

149. *Id.* at 747.

150. See *id.* at 749.

151. See 16 U.S.C. § 1851(a)(1) (Supp. 1999) (conservation measures must be employed to stop overfishing).

152. See *id.* § 1851(a)(8) (conservation measures must take into account the importance of fishing communities).

153. *Nat'l Res. Def. Council v. Daley*, 209 F.3d at 753. See 50 C.F.R. § 600.345(b)(1) (2000).

since there was no other alternative with similar conservation goals, neither the Secretary nor the court needed to mitigate adverse economic impacts on fishing communities.¹⁵⁴ Clearly the “plain language” of the statute is subject to many interpretations and its ambiguity is causing harm to the fishing-dependent communities.

2. The Plain Language: Consistent or Contradictory

The plain language of Standards 1 and 8 of the FCMA should not be read to require a strict balancing of interests. The national standards and the other provisions of the FCMA are written in a means-ends format where the primary goal is to end overfishing, while the means may vary depending on the circumstances.¹⁵⁵

NS-1 states that “[c]onservation and management measures shall prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery”¹⁵⁶ Strictly read, any FMP must prevent overfishing, regardless of any other factors, by bringing a fishery from an overfished state to an optimum state.

NS-8 does not in any way, under the plain meaning of the statute, modify the requirement under Standard 1 that “conservation shall prevent overfishing.”¹⁵⁷ NS-8 reads: “[c]onservation and management measures shall, *consistent with the conservation requirements of this Act*, take into account the importance of fishery resources to fishing communities.”¹⁵⁸ This standard is in no way contradictory or in competition with Standard 1. The legislative history tells us that “[NS-8] is also not intended to be used as a basis for circumventing conservation requirements.”¹⁵⁹ NS-8 only requires that when there is more than one option, the council or the Secretary must choose the one with the least economic impact.¹⁶⁰

The SFA confirms that in the plain reading of the statute, National Standard 1 and 8 cannot be balanced.¹⁶¹ In the “Findings, Purposes and Policy” provisions of the law, Congress repeatedly affirmed its objective of preventing overfishing in order to rebuild overfished

154. *Id.*

155. *See generally* Brief of Amici Curiae, Nat'l Res. Def. Council v. Daley, 209 F.3d 747 (D.C. Cir. 2000) (99-5308).

156. 16 U.S.C. § 1851(a)(1) (Supp. 1999).

157. *Id.*

158. *Id.* § 1851(a)(8) (emphasis added).

159. S. REP. NO. 104-276, at 14 (1996).

160. *See generally* S. REP. NO. 104-276.

161. *See generally* Pub. L. No. 104-297 (1996).

stocks.¹⁶² These provisions find that fish stocks have been depleted as a result of overfishing and related activities and that these fisheries must be managed to prevent irreversible effects.¹⁶³ The meaning of "optimum yield" within the SFA further shows that the express intent of Congress is to rebuild fisheries so that the highest yield can be attained in the future.¹⁶⁴ By changing the wording from one that allowed councils to *modify* the allocation of fish to fishermen to one that only permitted them to *reduce* the amount of fish to allocate to fishermen,¹⁶⁵ Congress furthered its intention that conservation be the primary purpose of the FCMA.¹⁶⁶ This modification shows that through the passage of the SFA, Congress moved away from protecting economic interests and toward protecting fish stocks.

Various sections of the FCMA explicitly state that the purpose of the Act is to end overfishing and that protecting economics will only be considered if the conservation goals can be met. The difference between the required and discretionary provisions of the FMPs is another explicit showing that Congress intended conservation, not economics, to be the primary goal of the SFA.¹⁶⁷ The FCMA is primarily a conservation measure.

According to the Code of Federal Regulations, "where two alternatives achieve similar conservation goals, the alternative that . . . minimizes the adverse economic impacts on such communities would be the preferred alternative."¹⁶⁸ The plain reading of the statute, legislative history, and the regulations passed pursuant to the SFA promote the idea that there can be no balancing between conservation and economics.

162. 16 U.S.C. § 1801 (Supp. 1999).

163. *See id.*

164. *See* 16 U.S.C. § 1802(28) (Supp. 1999).

165. *See id.* § 1802(28)(B).

166. *See* Fishery Conservation and Management Act of 1976, Pub. L. No. 94-265, § 301, 90 Stat. 346-47 (1976), as amended by 16 U.S.C. § 1802(28)(B) (Supp. 1999). ("['O]ptimum,' with respect to the yield from a fishery, means the amount of fish which— is (B) is prescribed as such on the basis of the maximum sustainable yield from the fishery, as reduced by any relevant social, economic, or ecological factor . . .").

167. *See* 16 U.S.C. §§ 1854(a)–(b) (Supp. 1999). *See also* Massachusetts v. Daley, 170 F.3d 23, 27 (1st Cir. 1999) ("The Magnuson-Stevens Act's main thrust is to conserve the fisheries as a continuing resource . . .").

168. 50 C.F.R. § 600.345(b)(1) (2000). *See* Nat'l Res. Def. Council v. Daley, 209 F. 3d 747, 753 (1999).

C. Fishing-Dependent Communities

1. Deference to Fishing-Dependent Communities: *North Carolina Fisheries Ass'n v. Daley*¹⁶⁹

The court in *North Carolina Fisheries Ass'n* was faced with the question of whether the actions of the Secretary of Commerce, in not obtaining an economic analysis of the economic impacts of the proposed FMP on small fishing communities within North Carolina, were "arbitrary and capricious."¹⁷⁰ The United States District Court for the Eastern District of Virginia found that the Secretary did not comply with the RFA in preparing an economic analysis.¹⁷¹ The Secretary's analysis failed to consider a community smaller than the entire state of North Carolina and ignored data which would have accounted for the number of vessels impacted by the agency's regulatory actions.¹⁷² In addition to violating the RFA requirement of taking into account the economic impacts of small entities,¹⁷³ the Secretary failed to make an economic analysis under NS-8.¹⁷⁴ The court held that the Secretary "completely abdicated his responsibilities" under the FCMA by not considering the population size of the fishing industry in local communities, the significance of the fishing industry on local economies, or even what constitutes a fishing community.¹⁷⁵ According to the court, the definition of a fishing community includes those communities "substantially dependent on or substantially engaged in the harvest or processing of fishery resources to meet social and economic needs."¹⁷⁶ The Secretary, in erroneously analyzing the situation, did not consider the adverse economic effects on any particular fishing community.¹⁷⁷ The court in *North Carolina Fisheries Ass'n* took an important stance against previous interpretations of the FCMA by suggesting that the Secretary abused his broad discretion.¹⁷⁸ The opinion supports the notion that the Secretary's authority "should not be used as a buzz saw to mow down whole fishing communities in order to save

169. 27 F. Supp. 2d 650 (E.D. Va. 1998).

170. 5 U.S.C. § 706(2)(A) (1994).

171. 27 F. Supp. 2d at 659.

172. *See id.*

173. *See* 5 U.S.C. § 603(a) (Supp. 1999).

174. *See N.C. Fisheries Ass'n v. Daley*, 27 F. Supp. 2d at 661. *See also* 16 U.S.C. § 1851(a)(8) (Supp. 1999).

175. 27 F. Supp. 2d at 662.

176. *Id.* at 663. *See* 16 U.S.C. § 1802(16) (1994).

177. *N.C. Fisheries Ass'n v. Daley*, 27 F. Supp. 2d at 663.

178. *See id.* at 667.

some fish.”¹⁷⁹ The court set aside the quota set by the Secretary, ruling that it was “arbitrary and capricious.”¹⁸⁰ This case demonstrates the court’s willingness to read the FCMA as protecting fishing-dependent communities.

2. Economic Analysis: *A.M.L. International, Inc. v. Daley*¹⁸¹

The plaintiffs in *A.M.L. International* brought suit in the United States District Court for the District of Massachusetts claiming that Secretary of Commerce Daley violated the RFA and certain provisions of the National Standards of the FCMA.¹⁸² The plaintiffs argued that the Secretary’s actions in implementing the FMP were “arbitrary and capricious.”¹⁸³ The court held that the closure of the spiny dogfish fishery was not a violation of NS-8 because the decision to close the fishery was better than the alternative of letting the fishery collapse.¹⁸⁴ In accordance with the regulatory requirements,¹⁸⁵ the Secretary considered twelve alternative schemes and chose the scheme which would be most likely to rebuild the fishery.¹⁸⁶ In addition, the court also looked at whether the Secretary violated the RFA and determined that the intent of the RFA is “not to limit regulations having adverse economic effects on small entities,” but rather for the agency to focus special attention on the impact it will have on small entities.¹⁸⁷ The court determined that the Secretary met the requirements of the RFA and was not required to limit regulations having adverse economic effects on small entities.¹⁸⁸ The court held that the Secretary’s decision, although it appeared harsh to those involved in the fishing industry, was not “arbitrary, capricious or otherwise contrary to the law.”¹⁸⁹

The factual situations in *A.M.L. International* and *North Carolina Fisheries Ass’n* are distinguishable. In *North Carolina Fisheries Ass’n*, the Secretary did not make any kind of economic analysis as is required under the RFA and NS-8. Instead, the Secretary looked at the entire state as a fishing community and found that it would be too difficult to

179. *Id.*

180. *Id.* at 668. See 5 U.S.C. § 706(2)(A) (1994).

181. 107 F. Supp. 2d 90 (D. Mass. 2000).

182. See *id.* at 93.

183. See 5 U.S.C. § 706 (2)(A).

184. See *A.M.L. Int’l*, 107 F. Supp. 2d at 103.

185. See 50 C.F.R. § 600.345 (2000).

186. See *A.M.L. Int’l*, 107 F. Supp. 2d at 103.

187. *Id.* at 105.

188. See *id.* at 106.

189. *Id.* at 108. See 5 U.S.C. §§ 706(2)(A)–(D) (1994).

take into consideration the economic impact on the entire state. In *A.M.L. International*, the court did an adequate economic analysis and considered twelve alternative schemes, determining that there was no way that the fishery could be saved except for a complete closure of the fishery.¹⁹⁰ Both cases recognize the importance of conservation while mandating consideration of the economic situation of the fishing communities. What recourse do fishing-dependent communities have when it comes to protecting their economic interests and still maintaining the stated purpose of the Sustainable Fisheries Act to end overfishing? There are ways to benefit fishing-dependent communities when it comes to the creation of Fishery Management Plans without interfering with the primary goal of ending overfishing.

III. Solution

The plain language of the FCMA clearly indicates that conservation is the primary objective of the Act and that the economic impacts upon dependent communities are secondary. In order to protect fishing-dependent communities, it is important that a clear and concise definition of the term "fishing community" be formulated, and that this definition not include every coastal community located along the east or west coasts. In addition, Community Development Quotas must be implemented to support failing or dependent communities that would be hurt by FMPs.

A. A New Definition for Fishing Communities

The current definition of a "fishing community" is too broad because it allows FMPs to take into consideration virtually every community along the Pacific and Atlantic coasts of the United States.¹⁹¹ The current definition of a "fishing community" fails to consider the size of the community, its primary source of income, or its viability if the FMP closes down a primary—or possibly a community's only—fishery.¹⁹² This formulation allows for conservation to be the primary factor when developing a fishery management plan. By creating such a broad definition of a fishing community and not allowing FMPs to

190. See *A.M.L. Int'l*, 107 F. Supp. 2d at 103.

191. See 50 C.F.R. § 600.345 (2000).

192. See generally 142 CONG. REC. S39 (daily ed. Sept. 18, 1996) (statement of Sen. Murray).

give preferential treatment to a specific community,¹⁹³ Congress has essentially made NS-8 a useless tool in protecting the needs of fishing-dependent communities.¹⁹⁴

The current construction of the FCMA requires that the Secretary and the councils look only at the economic effects of an FMP even when there are multiple alternatives arriving at the same conservation goals. The councils are to implement the plan or alternative that has the least adverse effects upon fishing communities.¹⁹⁵ Yet, when the regional councils analyze the economic impacts of every community that is either substantially dependent or substantially engaged in fishing, the statute requires the analysis of too many communities. A problem resulting from the current interpretation of the FCMA is that there are often numerous alternatives to choose from, as was the case in *A.M.L. International*. The plan that will allow for the most effective recovery usually does not take into consideration the economic impacts upon the communities. Plans that take economic impacts into consideration will not be considered because they do not allow for effective recovery of the fishery. Since the FMPs cannot give greater benefits to a specific community, it will be highly improbable that economic considerations will be analyzed at all.

Within the Code of Federal Regulations, there is a plan for protecting fishing communities under NS-8 of the FCMA.¹⁹⁶ This three part test should be the basis of the new definition of fishing communities. First, the plan must examine the social and economic importance of the fishery to the community affected by the FMP by using qualitative as well as quantitative information.¹⁹⁷ Second, the FMP should analyze the sustained participation of these communities within a particular fishery by analyzing the history, extent, and type of participation within a specific fishery.¹⁹⁸ Third, the FMP shall "assess the likely positive and negative social and economic impacts of the alternative measures, over both the short and long term, on fishing communities," taking into consideration the consumptive as well as non-consumptive uses of the fishery resources.¹⁹⁹ The regional councils

193. See 50 C.F.R. § 600.345(b)(2) ("This standard does not constitute a basis for allocating resources to a specific fishing community nor for providing preferential treatment based on residence in a fishing community.").

194. See S. REP. NO. 104-276, at 14 (1996).

195. See 50 C.F.R. § 600.345(b)(1).

196. See 50 C.F.R. § 600.345.

197. See *id.* § 600.345(c)(1).

198. See *id.* § 600.345(c)(3).

199. *Id.* § 600.345(c)(4).

should use this test in developing FMPs, and it should be enhanced to give greater deference to those communities on which an FMP will have the most impact.

While legislators have become intent on rebuilding fisheries, they must work to assure that those who have traditionally depended on a particular fishery are not arbitrarily shut out from their only source of income. Congress should amend the Sustainable Fisheries Act to not only conserve fish stocks, but to preserve the interests of those fishermen that depend upon those fish stocks. The FCMA that would best protect fisheries while protecting those that rely upon them would be one that gives deference to those fishermen who reside in a fishing-dependent community that is wholly dependent upon the fishery as its primary source of income.

B. Community Development Quotas and a New Hope for Fishing-Dependent Communities

The intended purpose of CDQs is to "contribute to the development of local economies and markets, the social and economic well-being of participants through enhanced self-sufficiency, and improvements in local infrastructures."²⁰⁰ CDQs are a tool that can be utilized to protect fishing-dependent communities. Beginning on October 1, 2000, the moratorium that prohibited regional councils or the Secretary from implementing additional quotas was lifted. CDQs have proven integral in turning around fifty-six Bering Sea fisheries in the north Pacific fishery and giving them an opportunity to take advantage of the nearby fish stocks. According to the National Research Council, "Overall the program appears on track to accomplishing the goals set out in the authorizing legislation: to provide the participating communities with the means to develop ongoing commercial fishing activities, create employment opportunities, attract capital, develop infrastructure, and generally promote positive social and economic conditions."²⁰¹ The effectiveness of CDQ programs in improving the living conditions of fishing-dependent communities prior to the lifting of the moratorium is a clear indication that the post moratorium period will bring endless benefits to fishing-dependent communities.

The CDQ program has benefited a number of fishing-dependent communities including the village of Alakanuk, Alaska, which was one

200. S. REP. NO. 104-276, at 28 (1996), *reprinted in* 1996 U.S.C.C.A.N. 4073, 4101.

201. NATIONAL RESEARCH COUNCIL, THE COMMUNITY DEVELOPMENT QUOTA PROGRAM IN ALASKA 1 (1999), *available from* <http://www.nap.edu>.

of the fifty-seven communities that obtained federal assistance.²⁰² Beginning in 1998, Alakanuk along with the fifty-six other selected communities, began “[sharing] the rights to catch a share of the Bering Sea bottom-fish and crab harvests.”²⁰³ These quotas supplement the more than twenty million dollars a year in revenue from preexisting quotas that have been allotted to the poorest villages.²⁰⁴ As a result of these CDQ programs, residents of Alakanuk have used their revenues for job training on how to “build the boats, run equipment and do the fishing themselves.”²⁰⁵ Those fishermen who fish in “open-access” fisheries have found that the quota system in general is a more preferable way to fish than the current “race to the fish”²⁰⁶ approach.²⁰⁷ Although the social and economic implications have yet to be quantified, the CDQ program gives the residents of Alakanuk the opportunity to participate in the fishing harvest, replacing economic despair with the hope for a more prosperous future.

Now that the moratorium has been lifted, regional councils throughout the United States will have an opportunity to protect fishing-dependent communities (like Alakanuk) that have suffered as a result of the mechanization of the fishing industry. CDQs are a highly effective way to permit communities to retain some control over their fishery by giving them a percentage of the fishery. In 2001, members of Congress began discussing the need for yet another revision of the SFA to give preference to fishing-dependent communities and to allow for reauthorization of the FCMA.²⁰⁸ Both bills are currently being reviewed by their respective committees. As a result of the scarcity of both fishery resources and fishing-dependent communities, it is imperative that Congress act to save both from destruction.

202. See Helen Jung, *New Fish Quotas to Boost Village Coffers*, ANCHORAGE DAILY NEWS, May 30, 1997, at A1; see also Weaver, *supra* note 1, at A1.

203. Jung, *supra* note 202, at A1.

204. See *id.*

205. *Id.*

206. This approach does not place any limits upon how many fish one may harvest, whereas the quota approach sets a maximum number of fish that one may harvest in a given area.

207. See Jung, *supra* note 202, at A1.

208. See Western Alaska Community Development Quota Program Implementation Improvement Act of 2001, H.R. 553, 107th Cong. (2001); see also IFQ Act of 2001, S. 637, 107th Cong. (2001).

Conclusion

The United States harvests almost ten billion pounds of seafood annually, making it the world's fifth largest fishing nation.²⁰⁹ However, there is a limit to our fisheries' resources. "Many coastal areas are dependent upon fishing and related activities, and their economies have been badly damaged by the overfishing of fishery resources at an ever-increasing rate over the past decade."²¹⁰ In developing FMPs, it is important that councils, as well as the Secretary of Commerce, give some deference to fishing-dependent communities either through the implementation of CDQs—by interpreting the FCMA to protect one class of fishing community over another—or through a Congressional amendment to protect those dependent upon fishing. It may be that in some fisheries, entire fleets will have to sit out, thus sacrificing short-term harvests, in order to attain the long-term benefit of sustainable fisheries. In this nation, there are many communities that rely on fishing as a source of income, while others rely on fishing as a source of survival. It is these fishing-dependent communities that live to fish and fish to live.

209. See *Reauthorization of the Magnuson-Stevens Act: Hearings before the Senate Subcommittee on Oceans and Fisheries of the Senate Committee on Commerce, Science, and Transportation*, 1999 WL 20010880 (July 29, 1999) (statement of Penelope Dalton, Assistant Administrator of the National Marine Fisheries Service of the United States Department of Commerce).

210. 16 U.S.C. § 1801(a)(3) (Supp. 1999).

